

No. 76-1410

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**JOSEPH V. AGOSTO, PETITIONER**

**v.**

**IMMIGRATION AND NATURALIZATION SERVICE**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

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**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

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**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 806.

**JURISDICTION**

The judgment of the court of appeals was entered on January 24, 1977. A petition for rehearing was denied on March 23, 1977. The petition for a writ of certiorari was filed on April 12, 1977 (Pet. App. iii). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether a genuine issue of material fact exists as to petitioner's nationality that would entitle him to a *de novo* hearing in the district court on this issue prior to deportation.

## STATEMENT

1. In 1967, deportation proceedings were instituted charging petitioner with entering the United States without presenting himself for inspection as an alien, in violation of Section 241(a)(2) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(a)(2). At the deportation hearing, petitioner claimed that he was a United States citizen (Pet. 3-4). Petitioner did not present any documentary evidence in support of his claim (Pet. App. vii). Instead, he relied upon the testimony of three witnesses, Mr. and Mrs. Pianetti, who had taken him from a foundling home and raised him, and Carmen Ripolino, who claimed to be his half brother (Pet. 4). These witnesses testified in support of petitioner's contention that he was Joseph Agosto, who was born in Cleveland, Ohio, in 1921.

On the other hand, the government's evidence established that petitioner was a native and citizen of Italy, who was born in Agrigento, Italy, on or about July 16, 1927. The government produced a copy of an entry in the Registry of Births indicating that respondent was born on July 17, 1927, to a woman who did not wish to be named, and was sent to a foundling home in the custody of a person who declared his birth before the registrar (Pet. App. vi). Documents also show that he was placed in an orphanage and baptized at the age of approximately two days (*ibid.*), and that a month later he was entrusted to the care of a couple, Pietro and Crocifissa Pianetti, and was later "affiliated" by them—that is, a court order was obtained allowing him to assume their surname (*ibid.*).

In 1947, petitioner was convicted in Italy of impersonating a police officer and judge in connection with a scheme concerning forged ration coupons, and was sentenced to imprisonment (S.R. 121-122). Petitioner thereafter obtained an Italian passport on which he falsely represented

himself to be an "industrial attorney" and left for Canada under the name of Vincent Pianetti, leaving a wife and children in Italy (S.R. 106-107, 191).

Around 1950, petitioner entered the United States from Mexico after showing a birth certificate identifying him as "Joseph V. Agosto," born in Cleveland, Ohio, in 1921. (S.R. 62, 69, 108, 113, 611).<sup>1</sup> He subsequently obtained other forms of identification, including several United States passports (S.R. 69, 113). Since his arrival, petitioner has used the name "Joseph V. Agosto" in all of his affairs in this country, including two marriages and a divorce. He was also convicted under that name of assisting in the falsification of papers in support of loan applications to the Federal Housing Administration, in violation of 18 U.S.C. 1010 (S.R. 614-615).

Petitioner conceded that the Italian records relate to him, but asserted that they were created in an effort to conceal the fact that his mother had given birth to him out of wedlock (Pet. App. vi).

2. On the basis of these facts, the Immigration Judge found petitioner deportable (S.R. 593-627). After carefully reviewing the evidence, the judge concluded that it overwhelmingly refuted the possibility that petitioner was Joseph Agosto, born in Cleveland, Ohio (S.R. 606-609).<sup>2</sup> The Board of Immigration Appeals affirmed the

<sup>1</sup>Petitioner claimed that his uncle had sent him the birth certificate in 1948, but official records show that certificate was not issued until December 31, 1951 (S.R. 607). This was several weeks after a Joseph Agosto, who met the description on the birth certificate, died in petitioner's home town of Licata, Italy (S.R. 604).

<sup>2</sup>The Immigration Judge found petitioner deportable on the additional ground that he was an alien who had been convicted of a crime involving moral turpitude (S.R. 613) and denied petitioner various forms of discretionary relief from deportation (S.R. 619-624). Petitioner does not challenge those rulings here.



order of deportation, finding that the government had proved petitioner's alienage by "clear, convincing, and unequivocal" evidence (Pet. App. xi).

The court of appeals, with one judge dissenting, affirmed the decision of the Board of Immigration Appeals and denied petitioner's request, under 8 U.S.C. 1105a(a) (5), to transfer the proceeding to district court for a *de novo* hearing on his claim of citizenship. It held that the evidence did not "disclose a colorable claim to United States nationality \* \* \*" (Pet. App. ii).

#### ARGUMENT

Pursuant to 8 U.S.C. 1105a(a)(5), if a person seeking review of an order of deportation, who claims to be a national of the United States, "makes a showing that his claim is not frivolous," the court of appeals must, "where a genuine issue of material fact as to the petitioner's nationality is presented," transfer the proceedings to a United States District Court for a hearing *de novo* of the nationality claim. See also *Kessler v. Strecker*, 307 U.S. 22, 35; *Ng Fung Ho v. White*, 259 U.S. 276.

Petitioner contends that under this provision the court of appeals should have transferred his case to the district court. He argues that he has presented evidence that, if believed, is sufficient to establish his American citizenship, and that the court of appeals upheld the deportation order only by improperly weighing and discounting the credibility of his witnesses. He also alleges that the decision below conflicts with those of other circuits, by making the Ninth Circuit "the only court which has denied transfer under the statute where the administrative decision turned on the question of the credibility of petitioner's witnesses" (Pet. 8-9).

Petitioner's fundamental error is that this case does not "turn[] on \* \* \* the credibility of petitioner's witnesses." While there was dispute over the credibility of the Pianettis and of Carmen Ripolino, and while the Board of Immigration Appeals noted that the immigration judge had found these witnesses not to be credible (Pet. App. viii), petitioner has not established a substantial, non-frivolous claim of American citizenship even if the testimony of his witnesses were credited. See *Rassano v. Immigration and Naturalization Service*, 377 F. 2d 971, 972-973 (C.A. 7). As the Board of Immigration Appeals noted, even accepting *arguendo* petitioner's evidence, in order to conclude that petitioner is a United States citizen, it would be necessary to believe (Pet. App. ix):

- 1) that the respondent's natural father was Salvatore Agosto (Tr. pp. 305, 340);
- (2) that Salvatore Agosto fathered a child born in 1921 in Cleveland, Ohio, whose name was Joseph, or Giuseppe, Agosto (Exs. 2 & 3), but that this child was *not* the respondent;
- (3) that the respondent's mother gave birth to a son in Akron, Ohio, in August of 1923 (Tr. p. 392), and that the father of this child was Giacomo Ripolino and not the father of the respondent (Tr. p. 395);
- (4) that the respondent's mother next gave birth to the respondent in August of 1924, one year later, in Cleveland, Ohio (Tr. p. 514);
- (5) that she knew the father of the respondent to be Salvatore Agosto (see Tr. 305, 340) and named the respondent Joseph or Joe Agosto, the same name that was given to an earlier child of the respondent's father (Tr. p. 482);
- (6) that the respondent's mother again began living in the same household as Giacomo Ripolino, and gave birth to a third son in Akron, Ohio, another year later in September of 1925 (Exs. 60 & 61; Tr. p.

399); (7) that the respondent's mother had him baptized in the United States (Tr. pp. 355-57); (8) that the respondent, who can afford to send an investigator to Italy to search records (Tr. pp. 425-26), has not been able to produce a certificate of his United States baptism, even though he ostensibly knows the name under which he would have been baptized and the general vicinity of Ohio in which the baptism likely would have occurred.

On these facts, the court of appeals properly concluded that "The evidence presented to the immigration judge does not disclose a colorable claim to United States nationality \* \* \*" (Pet. App. ii). The veracity of petitioner's witnesses was not a material fact relating to petitioner's claim that he is a United States citizen. Since the court of appeals did not evaluate "the credibility of petitioner's witnesses", its decision does not conflict with those of other courts of appeals, which have held that an issue of the credibility of a witness that is critical to a claim of American citizenship must be determined *de novo* by the district court. See, e.g., *Pignatello v. Attorney General*, 350 F. 2d 719, 723-724 (C.A. 2). The court of appeals correctly refused to transfer this case to the district court for a *de novo* hearing.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1977.